INDEX

	Page
Statement	1
1. The companies involved	2
Kennecott	2
Okonite	3
2. The acquisition	5
3. The effect of the merger upon competition	7
4. The judgment of the district court	10
Argument	11
I. *United States* v. *Aluminum Company of America*, 377 U.S. 271, establishes the illegality of Kennecott's acquisition of Okonite, a significant competitor in the concentrated market for paper-insulated wire and cable	12
II. Under *Brown Shoe Co.* v. *United States*, 370 U.S. 294, Section 7 of the Clayton Act prohibits Kennecott's acquisition of a major customer for refined copper (Okonite) as part of a significant trend toward vertical integration by copper producers	18
III. The district court correctly enjoined for five years further acquisitions in the markets adversely affected by the purchase of Okonite	23
Conclusion	26

CITATIONS

Cases:

Brown Shoe Co. v. *United States*, 370 U.S. 294 — 12, 15, 18, 19, 20

Federal Trade Commission v. *National Lead Co.*, 352 U.S. 419 — 25

Cases—Continued

	Page
International Salt Co. v. *United States*, 332 U.S. 392	25
United States v. *Aluminum Company of America*, 377 U.S. 271	8, 12, 13, 14
United States v. *National Lead Co.*, 332 U.S. 319	24, 25
United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158	17
United States v. *Philadelphia National Bank*, 374 U.S. 321	12
Statute:	
Clayton Act, Section 7, 15 U.S.C. 18	1, 9, 10, 11, 12, 13, 18, 19, 24

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 995

KENNECOTT COPPER CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court which adjudged that appellant, Kennecott Copper Corporation ("Kennecott"), the largest copper producer in the country, violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring in 1958 The Okonite Company ("Okonite"), the nation's second largest independent fabricator of insulated wire and cable. The judgment required Kennecott to dispose of its interest in Okonite and prohibited it from acquiring wire and cable companies or copper producers for five years.

1. THE COMPANIES INVOLVED

KENNECOTT

Kennecott is the world's largest copper producer (J.S. 4a). On the basis of current replacement value, its copper-producing assets alone are worth approximately $1.2 billion (Tr. 2332–2333). In 1958, Kennecott had sales of approximately $395 million; by 1962, its sales had increased to $514 million. At the end of 1962, Kennecott's capital and surplus were $757 million (GX 10).

The basic steps in the copper industry are mining, milling, smelting, refining, and fabrication (J.S. 4a). Kennecott operates four copper-producing properties in the western United States, as well as a copper mine in Chile; it owns copper refineries in Utah and Maryland (*ibid.*). Kennecott is completely integrated in the mining, milling, and smelting of copper and is largely integrated through the stage of refining (*ibid.*).[1] It is also partially integrated through the stage of fabrication. Prior to the acquisition of Okonite, Kennecott had two wholly-owned subsidiaries, Kennecott Wire and Cable Company ("KWC") and Chase Brass & Copper Company ("Chase"), operating in the two basic industries which consume refined copper: the copper wire and brass products industries (J.S. 5a).[2]

[1] The American Smelting & Refining Company is under contract to Kennecott to refine any balance of the latter's production not refined in Kennecott's own facilities (J.S. 4a).

[2] In 1958, wire mills consumed 59.2 percent, and brass mills consumed 38.3 percent, of all refined copper produced in the United States (J.S. 5a).

In 1958, these two subsidiaries received approximately 25 percent of Kennecott's total shipments of refined copper with the balance going to other fabricators (J.S. 24a). Kennecott was generally satisfied with the performance of its brass subsidiary, Chase, which had approximately 13 percent of the market for brass products and which consumed approximately 40 percent of Kennecott's shipments of copper to brass mills (J.S. 5a). Kennecott's management, however, was dissatisfied with the market position of its copper wire subsidiary, KWC, since it "accounted for less than 2 percent of wire and cable sales and consumed only about 10 percent of Kennecott's shipments to wire and cable companies" (*ibid.*). Since Kennecott's principal competitors had been increasing their fabrication capacity, through both the construction of new plants and the acquisition of independent fabricators, Kennecott was anxious to "acquire additional fabrication to replace fabricating accounts which it will lose or which will purchase only reduced quantities from Kennecott" (J.S. 5a–6a; GX 1, p. 2). Efforts were made to acquire the one-third interest in General Cable Company owned by American Smelting & Refining Company, but these proved unsuccessful (GX. 1, p. 4; J.S. 6a). Thereafter, negotiations were begun with the management of Okonite looking toward a merger between Kennecott and Okonite.

OKONITE

Founded as a family enterprise in 1878 and at the time of the merger still controlled by members of the founding families (GX 1, p. 4), Okonite was the sec-

ond largest independent company in the insulated wire and cable field at the time of its acquisition by Kennecott (J.S. 6a).[3] In 1957, Okonite's sales exceeded $40 million, and, as of August 31, 1958, it had assets in excess of $30 million; its capital and surplus account exceeded $16.9 million (Answer, para. 9). One of the most technically advanced of the wire and cable makers, Okonite's history from 1948 through 1956 showed annual total sales ranging from $28 million to $55 million (GX 5, J.S. 6a). The firm carried on its manufacturing operations in three New Jersey plants and had a nationwide system of sales offices and warehouses. It had "an excellent name, a skilled and experienced management team, and one of the best sales and distribution organizations in the industry" (GX 14, J.S. 6a). Okonite offered a line of insulated wire and cable quite broad by comparison with other independents (J.S. 6a). It relied heavily on research, leadership in engineering, and a reputation for qual-

[3] Only Essex Wire & Cable Corp. was a larger independent firm in the field. General Cable Company was also larger than Okonite, but due to its close relationship with American Smelting & Refining Company, a producer of refined copper, it was not considered an independent in the insulated wire and cable industry (J.S. 6a). Other companies, such as Western Electric, General Motors, and General Electric, fabricate insulated wire and cable, but most of their product is consumed internally in the manufacture of electrical equipment. Since their products are not generally sold on the open market in competition with such fabricators as Okonite, these companies are not considered independent fabricators of insulated wire and cable (Tr. 48–49, GX 470, GX 459, 460). Internal shipments in this "captive" market were excluded in the government's statistics accepted by the district court as to the size of this line of commerce, and the related shares of the merging companies (*ibid.*). Compare J.S. 19, 20.

ity products, in maintaining its position of leadership in the industry (J.S. 6a).

One of Okonite's principal products was paper-insulated power cable, a product widely accepted in the industry as a category of cable separate and distinct from any other kind of insulated power cable (J.S. 9a–12a). Okonite was the only independent among the four principal manufacturers of this product and enjoyed 19.6 percent of net sales in the year of the merger (J.S. 16a). The other three principal producers of this product were General Cable, closely related to American Smelting & Refining Company; the Anaconda Wire & Cable Company, a subsidiary of Anaconda; and Phelps Dodge Copper Products Corporation, a subsidiary of Phelps Dodge (J.S. 11a–12a; 15a–16a). These four companies controlled more than 90 percent of the paper-insulated power cable market (J.S. 16a). KWC also produced a limited line of paper-insulated power cable, with market shares ranging between 2.1 percent and 3.4 percent in the years immediately preceding the merger (GX 401). At the time of Kennecott's acquisition of Okonite, KWC's percentage of the net sales in this line of commerce was 2.1 percent (J.S. 16a).

2. THE ACQUISITION

The district court found that at the time of the acquisition of Okonite by Kennecott there were certain "economic forces which tended to promote integration in the industry" (J.S. 7a), that this "tendency existed in the entire copper industry" (*ibid.*), and that it "was in response to those forces that this

merger took place" (*ibid.*). Each of the nation's three largest copper producers had participated in the trend toward integration. Anaconda acquired the predecessor of its brass-fabricating subsidiary in 1922 due to its conviction that "it should be placed in a position to control the outlets of its metals and to promote the sale and distribution of copper and brass products" (J.S. 8a). It also formed its copper wire and cable subsidiary in 1929 by a series of acquisitions (*ibid.*). Similarly, Phelps Dodge entered copper fabrication by the acquisition of an independent fabricator in 1930 (*ibid.*) and Kennecott obtained both Chase and KWC by acquisition of independents in 1929 and 1935 (GX 17).

In recent years, expansion of copper firms into fabricating has occurred primarily on an internal basis rather than by acquisition. Such internal expansion by its two largest competitors spurred Kennecott to acquire Okonite (*ibid.*). Thus, as Kennecott's executive vice-president summed up the situation in 1958 in recommending that the board of directors consider the acquisition of Okonite (J.S. 5a–6a):

> * * * In general, Kennecott's competitors in this hemisphere have been increasing their fabrication facilities through new plants and through acquisitions of fabricators. Some independent fabricators feel that they will in the future be squeezed by the integrated companies in their efforts to market their copper production.
>
> It, therefore, appears essential if Kennecott is to be able to sell its mine production of copper that Kennecott acquire additional fab-

rication to replace fabricating accounts which it will lose or which will purchase only reduced quantities from Kennecott.

In enlarging its fabrication capacity, Kennecott chose external acquisition rather than internal expansion because "acquisition would eliminate severe competitive pressures that would otherwise develop" (GX 79, p. 15) and Kennecott "didn't want to duplicate any existing facilities" (Tr. 386).

Four months later, on November 24, 1958, Kennecott acquired the assets and business of Okonite for approximately $20 million. About one month after the acquisition, Kennecott made KWC, formerly its fabricator of insulated wire and cable, an operating division of Okonite. Following the merger, Kennecott dismantled KWC's equipment for manufacturing paper-insulated power cable and transferred all paper cable operations to the Okonite plants (Tr. 635–641, 647). Thus, Okonite is the only Kennecott division now engaged in the manufacture of this product.

3. THE EFFECT OF THE MERGER UPON COMPETITION

After extensive analysis of the facts, the district court determined the effects of Kennecott's acquisition of Okonite in two lines of commerce: (a) paper-insulated power cable, a submarket of a broader line embracing all insulated wire and cable and a submarket in which both Kennecott and Okonite competed; and (b) refined copper, a line of commerce stipulated by the parties prior to trial.[4]

[4] There is no dispute that the entire United States is the proper section of the country with respect to each of these lines.

(a) The district court held (J.S. 8a–12a) that paper-insulated power cable was an appropriate product market due to such "practical indicia" (J.S. 9a) as its unique physical characteristics and peculiar end uses, industry recognition that paper-insulated power cable is "a separate segment of the insulated wire and cable business" (J.S. 10a), the specialized equipment and vendors necessary for the production and sale of the product, and the special skills of "an identifiable group of companies in the industry engaged in the manufacture of paper insulated power cable * * *" (J.S. 11a).

It found (J.S. 23a–24a) that the market for paper-insulated power cable was highly concentrated; four companies (Anaconda, Phelps Dodge, Kennecott, and General Cable) controlled in excess of 90 percent of the total net sales after Kennecott's acquisition of Okonite (J.S. 16a).[5] The merger of the two companies joined Okonite's 19.6-percent share of the market, third largest prior to the merger, with Kennecott's share, which ranged from 2.1 percent to 3.4 percent in the years preceding the merger (J.S. 16a; GX 401).[6] Relying on these facts and on this Court's decision in *United States* v. *Aluminum Company of America*, 377 U.S. 271, the district court held that the acquisition of the second largest independent fabricator in this line of commerce by one of its competitors,

[5] The percentage share of the market of the four leading companies was a rising one, starting with 86.3 percent in 1954 and increasing to 92.9 percent after the acquisition by Kennecott of Okonite (J.S. 16a).

[6] In the year of the merger, Kennecott's share of the market was 2.1 percent (J.S. 16a).

which was the nation's largest copper producer and also a substanttial fabricator of paper-insulated wire and cable, violated Section 7 of the Clayton Act (J.S. 16a–17a).

(b) With respect to the effects of the acquisition in the market for refined copper (which was stipulated to be a separate line of commerce), the district court based its conclusion of illegality on the actual and potential foreclosure of small independent copper producers resulting from the elimination of Okonite as a customer for refined copper, and on the marked increase in integration which threatened to eliminate other independent fabricators from the market (J.S. 21a). Thus, Okonite, which had been consuming approximately 11,000 tons of refined copper annually (or at the current market price at the time of the trial of $0.31 per pound, almost $7,000,000 worth per annum (GX 491, 494)), was eliminated as a customer of the independent producers. And independent fabricators were threatened with extinction through the competition of their own suppliers, including the big-three copper producers who shipped approximately 65 percent of their total production to their own fabricating subsidiaries (J.S. 24a). The extent and nature of this long-range threat to competition was described by the district court as follows (J.S. 21a):

> The problem is that a few big copper producers may buy up the available independent fabricators. Fabrication would then cease being a small business field and would be dominated by a few giant corporations which produce their own copper. The remaining

> independent fabricators would fail because they could not compete against fabricators with assured sources of supply and large amounts of capital. The small copper producers would then have no place to market their product and would fail, increasing the concentration among producers as well. This has not happened yet, but Kennecott was worried enough about the continued existence of the independents that it felt that it had to capture one for itself.

The district court held that integration through the stage of fabrication by the big producers had proceeded so far even before Kennecott acquired Okonite that "any significant increase among the big three by merger is highly suspect" (J.S. 24a). It concluded that the merger had a not-insignificant effect on the refined copper line of commerce; that it substantially increased the already "alarming degree" (J.S. 23a) of integration in the industry; and that Kennecott's asserted justification for the merger—that independent wire and cable fabricators had "no future" in the copper industry—was contrary to the clear purpose of Section 7, which was to halt the very type of increasing concentration shown by the record in this case (J.S. 24a–25a).

4. THE JUDGMENT OF THE DISTRICT COURT

Shortly after rendering his opinion, findings of fact, and conclusions of law, District Judge Dawson died and, by stipulation of the parties, the case was assigned to Chief Judge Ryan for all purposes, including the settling of the decree. After a hearing, Chief

Judge Ryan entered a final judgment requiring the appellant to dispose of Okonite "so that the business of The Okonite Company and the parts and divisions thereof shall be reconstituted as an independent corporation capable of existence as a viable business" (J.S. 28a). The final judgment also prohibits the appellant for a period of five years from the date of divestiture "from acquiring the stock, assets or business of any company engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper insulated power cable * * *" (*ibid.*).

ARGUMENT

This case involves the validity under Section 7 of the Clayton Act of the acquisition by the largest copper producer in the country (and, indeed, in the world) of the nation's largest independent fabricator of paper insulated wire and cable, a line of commerce representing as much as $64 million in annual net sales in recent years (GX 471). Noting that the copper industry is highly concentrated in production and refining of the metal and that integration of primary producers through the fabrication stage "has already proceeded to an alarming degree" (J.S. 23a), the district court stated (J.S. 24a) that "any significant increase [in such integration] among the big three by merger is highly suspect." It held that Kennecott's acquisition of Okonite violated Section 7 because of its effect in two lines of commerce—the horizontal impact in the manufacture and sale of paper-insulated power wire and cable (the market in which both companies competed prior to the merger),

and the vertical impact in the production and sale of refined copper, a basic ingredient of power cable.

The legal issues that appellant raises involve such questions as the proper criteria for delineating the relevant product market under Section 7 and the appropriate standards for appraising the horizontal and vertical effects of a merger to determine whether it may tend substantially to lessen competition in any line of commerce. The government has frequently brought such issues before the Court and does not question their general suitability for its determination. In the present case, however, the issues presented are so far within *United States* v. *Aluminum Company of America*, 377 U.S. 271 and *Brown Shoe Co.* v. *United States*, 370 U.S. 294,[7] as to leave no substantial question for full-dress argument. Accordingly, the judgment below should be affirmed.

I. *UNITED STATES v. ALUMINUM COMPANY OF AMERICA*, 377 U.S. 271, ESTABLISHES THE ILLEGALITY OF KENNECOTT'S ACQUISITION OF OKONITE, A SIGNIFICANT COMPETITOR IN THE CONCENTRATED MARKET FOR PAPER-INSULATED WIRE AND CABLE

A. The district court held that the merger violated Section 7 of the Clayton Act because of its horizontal effects in the market for paper-insulated cable. This result was dictated by the decision in the *Alcoa* case, where this Court held that (377 U.S. at 278–279) in "highly concentrated markets, dominated by a few companies but served also by a small, though diminishing,

[7] See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

group of independents," the acquisition of one of the few significant remaining independents by one of the leading integrated companies violates Section 7.

The crucial facts in the instant case are strikingly similar to those previously before this Court. Here, as in *Alcoa*, the market was "dominated by a few companies but served also by a small, though diminishing, group of independents" (J.S. 16a). In *Alcoa*, five companies controlled about 65 percent of the market; in the present case, four companies controlled in excess of 90 percent of the market and, as in *Alcoa*, a substantial independent competitor was eliminated by the merger. Similarly, while not decisive, the market shares of the merging companies in the present case were quite similar to those in *Alcoa*. Indeed, here it was the independent fabricator (Okonite) which had the larger share of the market before the merger (19.6 percent as contrasted with Kennecott's 2.1 percent), while in *Alcoa* the integrated producer had the larger share. In both cases the result of the merger was to increase substantially the degree of concentration in an already highly concentrated industry by the elimination of an important independent competitor. *Alcoa* teaches that this effect is enough to show that the merger is likely substantially to lessen competition.

Although we believe this analysis of the structure of the market and the roles of the merging competitors was in itself enough, under *Alcoa*, to sustain the decision below, there was more before the district court. It noted that the vigor of competition had already diminished because of the small number of competitors, stating (J.S. 12a):

> Each of the four principal paper cable manufacturers—Okonite, General Cable, Phelps Dodge and Anaconda—has issued a paper cable price book. Each company sells paper insulated power cable under identical instructions and under a complex pricing formula based on such factors as the price of copper, the price of lead and the price of insulation, and each company uses the identical pricing formula.

The elimination of KWC as a substantial competitor in this concentrated industry would reduce whatever opportunity remains for price and other forms of competition.

B. Appellant's major challenges to the controlling force of *Alcoa* are its contentions: (1) that KWC was not a significant competitive entity before the merger and that Okonite would not have survived as a competitor in the absence of the merger (J.S. 13–15, 24); and (2) that paper-insulated wire and cable is not a separate product market (J.S. 7–10). Neither of these contentions has merit.

1. The record simply does not support appellant's assertion that the merger was an economic necessity because both its own fabricating facility, KWC, and Okonite were actually or imminently in a failing condition. As indicated in the Statement, *supra,* Okonite was a very substantial firm; this was shown by such objective factors as management, assets, sales, technical know-how, and product line.[8] There is no indica-

[8] There is little in the record that supports the intimation (J.S. 6) that Okonite had exhausted its borrowing capacity and could not expand on its own. Actually, as the trial court specifically found (J.S. 22a), Okonite was planning a substantial

tion that Okonite would not have maintained or improved its reputation as "a leader in their field in know-how and production ability" (GX 13) and as "the largest independent full-line cable manufacturing concern that was pre-eminent in the public utility field" (Tr. 386). With respect to KWC, the record establishes that it was a viable, active competitor in its field, with paper cable products as acceptable to the trade as those of its rivals (Tr. 906–907). KWC had been a profitable operation over the years and there was no expectation that this condition would not continue with the backing of the world's largest copper company (see GX 1, p. 3).

2. The record fully and convincingly supports the district court's conclusion that paper-insulated power cable constitutes a separate and distinct submarket in which the horizontal effects of the acquisition should be assessed. In reaching this conclusion, the court carefully evaluated and discussed at length (J.S. 8a–12a) the "practical indicia" of a separate submarket noted in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325, and found that each indicated that paper-insulated cable was such a market.

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internal expansion, through the construction of its own rod mill. This development was blocked by the merger. It is true, as appellant points out (J.S. 5), that Okonite's net profits fell to "a nominal $2,000 in 1958," the year of the merger, but the record clearly establishes that this decline was directly related to substantial, non-recurring costs incurred in moving a large paper cable manufacturing facility from Wilkes-Barre, Pennsylvania, to a more modern facility in New Jersey (GX 5, p. 8; GX 1A, p. 2; GX 2). Immediately prior to the merger Okonite itself regarded its future prospects as "bright" (GX 5, p. 7).

Thus, "[i]n the main, paper insulated power cable has no effective competition in the area of its major use from other types of insulated power cable" (J.S. 10a–11a). This unique and economically significant capacity for use as a conductor in underground ducts (J.S. 10a) may, in itself, be determinative of a separate market, but there is much more to support the court's conclusion. Specialized machinery is required to manufacture this product; special technical knowledge is equally necessary (J.S. 11a). There is a distinct group of customers who purchase paper-insulated cable; separate specifications are published for it (*ibid.*). An identifiable group of companies in the industry engage in the production of paper-insulated power cable, and their prices tend to be identical (J.S. 12a). Finally, the manufacture of paper cable is generally recognized in the industry as a separate segment of the insulated wire and cable market (J.S. 9a–10a);[9] it is so recognized by the industry's own trade association, as well as by the Bureau of the Census which lists and classifies paper-insulated power cable as a separate product (*ibid.*)

Appellant contends that this market is at once too narrow because it excludes some competitive cable insulated with plastic and other non-paper insulations and too broad because it includes all forms of paper-insulated power cable although KWC, unlike Okonite, did not produce a "full line" of such cable. The short answer to both contentions is that defining a

[9] Indeed, Kennecott itself recognized that the product duplication between it and Okonite lay in the field of paper-insulated power cable (see GX 1, p. 7).

product market is necessarily a practical effort, and no product market will ever be theoretically perfect as an instrument of measuring the competition affected by an acquisition. Because approximation is a necessity, reasonableness and not perfection has always been the standard. It is clear in this case that the market chosen not only provides a reasonable and fair measure of the effects of the acquisition but also provides the best possible measure within the limits of practicality.

Surely no more was required for the exclusion from the submarket of cables insulated with plastic and other materials than the district court's thoroughly supported (see, *e.g.*, Tr. 351) finding that "paper insulated cable has no effective competition in the area of its major use from other types of insulated power cable" (J.S. 10a–11a). Similarly, its decision to include all forms of paper-insulated power cable rather than tailoring the market to the measure of KWC's product line is supported not only by the administrative difficulty (if not impossibility) of inventing, defining, and measuring novel subcategories of a recognized market but also by the fact that KWC, at the very least, represented a significant threat of potential competition throughout the whole line of paper-insulated power cable. It was, after all, expert in the technology, familiar with the customers, ambitious, and backed by the immense financial resources of Kennecott. Cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158.[10]

[10] Although these facts alone plainly support the inclusion in a single submarket of all forms of paper-insulated power

C. Finally, appellant contends that the government has recognized the desirability of a combination of Kennecott and Okonite in the manufacture of paper-insulated cable and wire, for it has suggested that Kennecott should divest all of Okonite, including the division of Okonite which was formerly Kennecott's subsidiary, KWC. But KWC no longer produces paper cable; following the merger Kennecott removed all paper cable machinery from the KWC plant, which is now used exclusively in the manufacture of other products (Tr. 635–641; 647). The government's suggestion thus reflected only the unfortunate difficulties of unscrambling assets which have been illegally combined and not any approval of a continuing combination of the paper-cable producing facilities of Okonite and Kennecott. Indeed, the basic change in the character of KWC's operations since the merger means that if Kennecott now wishes to reenter the paper-cable field, it will have to do so through its own internal expansion.

II. UNDER *BROWN SHOE CO. v. UNITED STATES*, 370 U.S. 294, SECTION 7 OF THE CLAYTON ACT PROHIBITS KENNECOTT'S ACQUISITION OF A MAJOR CUSTOMER FOR

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cable, we also note that (by Kennecott's own figures) about 55 percent of Okonite's dollar sales in 1958 were attributable to solid paper-insulated power cable (DX 103) and that, in the entire industry, approximately 70 percent of the total footage of cable sold and shipped is in the range below 25 kv., well within the range in which KWC held itself out as a competitor prior to the merger (GX 148, Tr. 393–394, 791–794). Finally, prior to this acquisition the Kennecott management had no doubt that paper-insulated cable represented an "important competitive item" in the competition between Kennecott and Okonite (GX 1, p. 7; see, also, GX 410, 471, 477).

REFINED COPPER (OKONITE) AS A PART OF A SIGNIFICANT TREND TOWARD VERTICAL INTEGRATION BY COPPER PRODUCERS

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 328–334, this Court discussed the principal factors to be considered in assessing the vertical effects of a merger: the share of the market foreclosed; the purpose of the merger; the trend toward vertical integration in the industry; and the effect of the merger upon the Congressional policy of preserving local control of relatively small and independent businesses. The district court in the present case carefully considered and correctly applied each of these factors in determining that Kennecott's acquisition of Okonite, a purchaser of refined copper, would probably substantially lessen competition in the refined copper line of commerce. It relied particularly upon (a) the purposeful pre-emption of Okonite as a substantial customer of that product and (b) the "alarming" degree of integration through the stage of fabrication in the copper industry which threatened to drive independent fabricators out of the market, thereby depriving small copper producers of a market for their product (J.S. 21a–22a).

A. Appellant's principal contention with respect to the pre-emption of Okonite appears to be that the latter's consumption of refined copper is *de minimis* (J.S. 16–19, 25), and therefore the loss to competition is beyond the reach of Section 7. The facts are, however, that in 1958 Okonite consumed some 10,945 tons, or 0.9 percent of total national consumption (GX 235). Based on the market price of $0.31 per pound at

the time of trial, Okonite represented a market for refined copper in excess of $6,785,000 (GX 491, 494). And Kennecott estimated that an expanded Okonite operation would consume as much as 54,000 tons of refined copper annually (GX 1, pp. 1, 6). Okonite thus plainly represented a substantial segment of the market; indeed, it appears to have been the largest independent cable producer that Kennecott could acquire (see *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 331–332).[11]

The importance of the market represented by Okonite's copper purchases is well described in the internal Kennecott memorandum on the basis of which the acquisition was undertaken. The company's executive vice-president stated that "Kennecott's refined copper sales were in jeopardy" because of the anticipated over-supply of copper production, and the increasing integration of copper producers into fabrication, resulting in a "squeeze" on independent fabricators (GX 1, pp. 1–2; see testimony of the same official, Tr. 2283–2284, 2361). Because it appeared "essential if Kennecott is to be able to sell its mine production of copper that Kennecott acquire additional fabrication" (GX 1, p. 2), the acquisition of Okonite was recommended. If thus foreclosing Okonite's portion of the market as an outlet were as important to a vast producer like Kennecott as its internal memorandum indicated, it would be many times

[11] The only independent larger than Okonite was Essex Wire & Cable Corp. Kennecott considered acquiring Essex but determined that the company "did not meet our requirements" (GX 1, p. 4). In addition, Kennecott sought—but was unable—to acquire the interest in General Cable Corp. held by American Smelting & Refining Co. (*ibid.*).

more important to the smaller independent refiners and the competition which they provide.

B. The district court properly recognized that the impact of the present acquisition could not be divorced from the industry's trend toward integration into fabricating—a trend which caused Kennecott's acquisition of Okonite and in which this acquisition was a further substantial step. After detailing the history of integration in the copper industry, the court found that Kennecott and the next two largest copper producers, Phelps Dodge and Anaconda, accounted for about 60 percent of the refined copper shipments, and that about 65 percent of these three companies' shipments was consumed by their own fabricating facilities (J.S. 24a). Kennecott's acquisition of Okonite was not only caused by these forces, but also served to accelerate them.

The danger of allowing the trend of integration to continue was, the court found, real and obvious—independent fabricators would be driven out of business because of the cost advantages enjoyed by their suppliers, who also were competitors. The result would be not only the elimination of a number of comparatively small independent fabricating businessmen but also a crucial loss of markets to non-integrated producers of copper (J.S. 22a):

> The integrated companies obtain the copper raw material at their cost of production, while the nonintegrated companies must pay the market price and then process the wirebar [refined copper] into wire and cable and sell it at a competing price with the integrated company.

> The integrated companies thus have an opportunity for profit in the production of the metal to justify their staying in a market where there is a squeeze on fabrication, whereas the non-integrated companies have no alternative opportunity for profit.[12]

The end result of the elimination of independent fabricators would be to deprive smaller non-integrated producers of copper of a market for their products. The court found (J.S. 21a):

> The problem is that a few big copper producers may buy up the available independent fabricators. Fabrication would then cease being a small business field and would be dominated by a few giant corporations which produce their own copper. The remaining independent fabricators would fail because they could not compete against fabricators with assured sources of supply and large amounts of capital. The small copper producers would then have no place to market their product and would fail, increasing the concentration among producers as well. * * *

[12] The court noted (J.S. 22a) that this very process was already going on. The price of insulated wire and cable had been falling since 1958 while the price of refined copper remained stable, resulting in reduction of profit margin or the sustaining of losses by manufacturers of insulated wire and cable. The stability of copper prices demonstrates that the disadvantage to non-integrated cable producers is not likely to be relieved by availability of imports of refined copper, as appellant suggests (J.S. 16–17). In any event, there is a duty on copper imports, and the price of foreign copper has often exceeded the price of the domestic product (GX 6, p. 27; GX 347). There is no indication that foreign copper delivered in this country would be cheaper.

It was upon this realistic appraisal of the industry that the court declared that "any significant increase" in integration "among the big three by merger is highly suspect" (J.S. 24a). In view of the actual foreclosure of Okonite as a customer for refined copper and the probability that a continuation of the trend of integration would result in the elimination of other independents and of the market they furnish for the refined copper of small non-integrated producers, the district court correctly concluded that the result of the Kennecott-Okonite merger was likely to be a substantial lessening of competition in the manufacture and sale of refined copper.

III. THE DISTRICT COURT CORRECTLY ENJOINED FOR FIVE YEARS FURTHER ACQUISITIONS IN THE MARKETS ADVERSELY AFFECTED BY THE PURCHASE OF OKONITE

The decree requires Kennecott to divest its interest in Okonite, and also prohibits Kennecott for a period of five years from acquiring any other company "engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper insulated power cable * * *" (J.S. 27–28a). Appellant does not contest the appropriateness of divestiture. It urges, however, that the injunction against future acquisitions was improper, and that, in any event, the injunctive provisions are too broad.

Contrary to appellant's assertion (J.S. 24), there was abundant evidence in this case demonstrating the need for such an injunction. The record established, and the district court found, that the copper industry is marked by a substantial trend to integration

through the fabrication stage by the three largest producers. Appellant, the largest producer, not only had participated in that trend by its acquisition of Okonite but specifically announced that that merger was "only the first step" in a major expansion program in the electrical transmission field (Tr. 1531).[13] In these circumstances, where appellant intended to add further to the "alarming degree" (J.S. 23a) of integration already existing in the industry and where, in fact, a part of its expansion (the acquisition of Okonite) violated Section 7 of the Clayton Act, a provision enjoining future acquisitions of wire and cable fabricating companies for a limited period was a necessary item of relief. See *United States* v. *National Lead Co.*, 332 U.S. 319, 338.

The prohibition of acquisitions by Kennecott of companies producing refined copper was also well within the trial court's discretion. While Okonite was not a copper producer itself, the vertical impact of the acquisition on competition among such producers violated Section 7. The acquisition, like other forms of forward integration, was motivated by a desire to avoid the pressure of competition among copper producers (*supra*, pp. 20, 21–22); other attempts to reach the same end could be anticipated. Thus, the court held that the probable result of the

[13] As already indicated (p. 20, *supra*), Kennecott felt it had to expand its fabricating operations to assure a market for its copper production. It planned an expansion of Okonite to consume as much as 54,000 tons of refined copper, or approximately 5 percent of total domestic consumption (GX 1, pp. 1, 6; see also GX 52, p. 2).

process of which the Okonite acquisition was a part would be the elimination of small copper producers, thereby "increasing the concentration among producers * * *" (J.S. 21a). In the context of an extremely concentrated market for refined copper, an injunction designed to prevent further increases in this concentration for a period of five years was reasonable and proper.

Nor is there merit in appellant's contention (J.S. 24) that the judgment improperly forbids acquisitions outside the United States. As Chief Judge Ryan stated (Transcript, November 12, 1964, p. 30):

> * * * [U]nless I make [the judgment] as broad as this, there would be nothing barring Kennecott from setting up a foreign subsidiary to make paper insulated copper cable abroad and then bringing it back to the United States and marketing it here. That would be a direct attempt at accomplishing what the Court would find to be wrong here at this stage.

Moreover, Judge Ryan pointed out that if the exigencies of foreign competition during the relatively short life of the injunction require Kennecott to take steps that might appear to violate the decree, "the law is quite plain that you can always come in and ask for modification * * *" (*ibid.*). See *United States* v. *National Lead Co.*, 332 U.S. at 363; *International Salt Co.* v. *United States*, 332 U.S. 392, 401; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

We submit that the injunctive provisions in this case are reasonably directed at the primary purpose of restoring competition in the markets involved and

that no abuse of the trial court's discretion has been shown.

CONCLUSION

The decision below is correct. Because the case is controlled by precedent the appeal presents no question warranting plenary consideration. The judgment of the district court should be affirmed.

Respectfully submitted.

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